THE SYSTEM BEST ADAPTED TO THE UNITED STATES

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The best system would obviously be best adapted to the best nation. Though not intending to indulge in boasting, we would be very loath to admit that the United States was not easily first among nations. If there are reasons why the system is objected to, these reasons then must obviously be based upon mere prejudice. Such ought not to stand in the way of its adoption when the facts are fully known; and will not stand in the way if our nation really is the best and its people worthy of it.

Workmen's compensation is at present being presented to the American people in three forms, viz.:

First: In a form merely optional, i. e., contemplating that employers and employees should bring themselves under its provisions (which, except in the Ohio bill, provides for direct liability of the employer, instead of insurance) by their own action, or quasi-optional, i. e., requiring them, if not desiring to be bound by its provisions, to take affirmative action indicating their election.

A law of the former character was enacted in New York last year, and took effect on September 1st last. It is reported that but one employer has brought himself and his employees within its purview. This, notwithstanding the fact that the defenses against employers' liability have been considerably modified, a fact which is elsewhere expected to cause all employers to seek refuge under the provisions of such an act.

Possibly a law like that which is proposed in Ohio, removing the defences against an action for negligence, but offering a safe haven in state insurance of the compensation type, might bring more employers under the compensation provisions.

Undoubtedly, under a quasi-optional system, requiring written notice to certain officials to avoid coming under its provisions, a very large proportion would find themselves included within them; but the same reasoning which caused the Court of Appeals of the State of New York to hold that a so-called "compulsory com-

pensation act" is unconstitutional, as taking private property without due process of law, would perhaps apply to any such form, not wholly and in fact optional.

Moreover, it cannot be denied that either an optional or a quasi-optional workmen's compensation system is but a partial and incomplete solution of the serious problems at which such legislation is directed.

Notwithstanding all this, New Jersey has just had recourse to legislation of this type, and such legislation is in process of enactment in Ohio, with every chance of success and differing from the other only in that state insurance is the option offered. It is also expected that the Wisconsin legislation will take the same form.[1]

Second: A law substituting for the present employers' liability law, a system of workmen's compensation, the employer to be liable for the payment of the compensations and the same to be applicable to all employments.

With the exception that it was not made applicable to all employments, but only to certain of them which were selected by reason of the extraordinary peril attending them, and by reason of their not being in competition with similar industries of other states, this is the form which was taken by the so-called "compulsory" workmen's compensation act of New York.

It is now a matter of history that this has been declared unconstitutional by the unanimous opinion of the Court of Appeals. It is declared unconstitutional both under the provisions of the state constitution, and under the provisions of the federal constitution. Against the former determination there is no appeal; and, consequently, so far as New York is concerned, the question is finally disposed of, unless the constitution be amended.[2]

Should such a system be upheld, it would produce as good results as would an optional system such as the New York or the New Jersey type, if the latter were to be universally accepted.

But this system, even if available, is certainly not the best. In the first place, it involves many uncertainties, both for the employer and for the employees. Thus, had there been such a statute in force and applicable to the manufacturing company upon whose

[1]It has, as have also the new laws in New Hampshire and California.

[2]This has since been recommended by the Commission and a bill has been introduced to submit an amendment to the voters.

premises the frightful holocaust occurred in New York on the very day the decision of the Court of Appeals was announced, it would have resulted, as doubtlessly suits for negligence under the existing law will result, in the ruin of the employer while little, if anything would have been realized for the families of the deceased or for those who were injured.

This illustrates two things, viz.: (a) that it is by no means certain that, under the system of holding the employer directly liable, the burden will be distributed, and thus appear in the price of the products or services to be paid consequently by the consumer; and (b) that it is by no means certain that the compensation will be paid at all. In neither case is the community well served.

In the next place, it is a wasteful system. The only means by which a proper distribution of the costs can be made under it is by private, voluntary insurance. In Great Britain, where such a law is in force without modification, and where the best stock companies in Europe that insure against such risks, are to be found, it costs, roughly, a shilling for expenses to get a shilling of benefits to the dependents of the deceased workmen and to those who are injured. It costs no less than 30 per cent of the entire sum disbursed in benefits merely to pay agents for soliciting the patronage of employers; and this does not include the costs of superintendence.

If an adequate system of this type were introduced throughout the United States, giving benefits as large as, for instance, in Germany, I estimate that it would cost, net, about $400,000,000 per annum, to pay the compensation after the plan was in full swing.

If the expense were 100 per cent, as in Great Britain, this would mean $400,000,000 added to the net cost. Of this vast sum at least $120,000,000 would be paid for the services of solicitors—an army of agents, yet to be drawn from other occupations and put into this.

These figures may look large; but it was estimated several years ago from the official returns, that the commissions to fire insurance agents in the United States were no less than $115,000,000; and it is safe to say that under an adequate system of workmen's compensation, covered only by private insurance, the premiums would aggregate a greater sum than is paid for fire insurance. The amount paid in commissions would be at least as large, and the amount paid in total expenses would be considerably larger.

Moreover, there is virtually an irresistible tendency, when the employer is held directly liable, to impair the effectiveness and value of the compensation system itself.

Thus all such bills offered in the United States so far, have provided for limiting the payment of benefits to cases of total disability, or to widows and orphans, for a certain number of years, thus leaving all those who live beyond that period unprovided for.

In no other country, not even in those which have adopted legislation of this type, has such cowardice been exhibited. In our own, it has not been exhibited as will be seen, in the state insurance law, just enacted in the state of Washington.

There are two things which have caused this action to be taken, viz.: The objection that an employer does not wish to be placed in a position where he will be liable to furnish a permanent income to the injured individual or his dependents. It is put thus: "It must stop, somewhere." In the next place, the private insurance companies have, to my knowledge, urged that they could not well figure what it would cost on this basis. This is true in a sense, although such costs may be estimated from foreign statistics, within a reasonable range.

Even when, as in Great Britain, there is a provision that at least the benefits for permanent disability must be paid during the continuance of the disability, it is found in practice that every loophole in the statute which will permit compromise is promptly availed of. This is well illustrated by the very small reserve which British companies are required to hold in order to take care of such deferred liabilities and perhaps even better by this criticism which recently appeared in a prominent British insurance paper, operated also as a journal in the interest of the companies:

> We must say, that if anything is likely to provoke the State to start compensation insurance, it is the action of many offices in "bluffing" claimants into unjust settlements. Almost every day we notice in some part of the country the intervention of the County Court to prevent the registration of some agreement which is manifestly unfair . . . . . To-day they often trade upon the ignorance of claimants when they should be collecting higher premium rates. This naturally arouses the anger of all right minded persons and it certainly gives those members of the community who are inclined towards socialism an opportunity to plead for the nationalization of all the means of production, distribution and exchange. If the insurance offices serve the public well they have nothing to fear, but shaving claims to swell dividend returns is not good service.

This editorial was based upon the following statement concerning the decision of a British judge:

> Judge Emden said that he did not approve at all of those lump sums. They were getting far too frequent. He believed that he was correct in saying that now the larger portion of the work under the Workmen's Compensation Act was being transacted under agreements of that character and the object of the act was being defeated. If the case before him was, as was alleged, an improper case to bring, it was not a case for an agreement at all, and ought to be dismissed. If it was a proper case, then an agreement was not the right way to dispose of it, and he did not think the workman would be properly protected unless the matter came before the court. He had been watching those cases for some time, and his conclusion, based upon investigation, was that the whole beneficial effect of the act was being defeated.
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> Mr. Hurd said if the payment of lump sums under agreements were abolished there ought to be some central authority to say when a man should return to work.
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> Judge Emden—That is equivalent to saying the act cannot be worked in its present way satisfactorily.
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> His Honor declined to accede to the application, remarking that agreements of that kind were increasing to such an extent that he must do all he could to stop him.

When the payments are commuted in this manner, the ultimate result must be that one of the chief purposes of such legislation, viz.: that these unfortunates be provided an income, will be defeated; and it is to be expected in consequence that they will soon be dependent on public or private charity, precisely as if no such plan had been introduced.

As much is indicated, likewise, by the reports of the committee sent by the Trades Congress of Great Britain to study the German situation, which said, among other things, that it was observable that in Germany there were literally no slums—a fact sharply in contrast with the conditions in Great Britain under its exceptionally liberal compensation act.

Third: A system of compulsory insurance in which the state lends its sovereign power to afford at least the compulsion and in which it either may or may not also assume the management and conduct of the business.

Many critics have regarded this as peculiarly un-American; but the interesting thing about it is that it was regarded as quite as

peculiarly un-German, un-Norwegian, un-Gallican, and, so late as three years ago, un-British, and on precisely the same ground, viz.: that "ours is a free people and will not endure compulsion."

Yet the system has now been in use in Germany for twenty-five years, and is so thoroughly satisfactory, both to employers and employees, that nothing would induce them to change. It has also been in force in Austria for nearly as long a period, a country where they have the mixed population problem as in the United States, and in a more aggravated form. The satisfaction with the system has been such that the joint kingdom of Hungary has, after waiting over twenty years also introduced compulsory insurance. In Norway, which has the reputation of being, next to Switzerand, the most democratic country in Europe, it has been so popular likewise that compulsory sickness insurance, recently introduced, is now also generally acceptable. In France, after two decades of resistance and oven ten years' experience with a law holding the employer directly responsible, compulsion has been accepted in connection with an invalidity and pension fund plan. And in Great Britain, there is virtually no outcry on the part of either employers or employees, against the proposals of the present government to introduce compulsory insurance against invalidity and also against unemployment.

In our own country, even before the present agitation got under way, the employers and employees who were engaged in coal mining in certain counties in Maryland, were so much in earnest about the matter that after passing one compulsory insurance act, which was declared unconstitutional, they secured another to obviate the constitutional difficulties; and the legislature of Montana, with the approval of the owners of coal mines there as well as of the miners, adopted a similar plan for that state.

At the present time, plans of state insurance, either compulsory or optional or quasi-compulsory, are before the legislatures of several states, including Michigan, Ohio and Texas, and already a compulsory state insurance plan, applying to nearly all employments, has been enacted into law in the state of Washington.

It does not appear, therefore, that when the subject is fully understood, there is any insuperable prejudice against state insurance, if it will produce the best result for the least expenditure of money. It must be admitted that state insurance is effectual. It

really does accomplish what it sets out to accomplish. It has everywhere been conducted economically, whether the management be kept in the hands of the state or in the hands of the employers or of employers and employees together. Thus, the expense in Norway, Austria and Germany is in no case more than 16 per cent of the net costs,[3] as compared with 100 per cent in stock companies in Great Britain.

In Germany, the management as to permanent disability, widows' and children's benefits is in the hands of mutual associations of employers and the benefits of the first thirteen weeks, in the hands of sickness insurance associations in which the employees elect two-thirds of the trustees and the employers one-third, and it has been found that the cost of management is even a little less than elsewhere, the employers' associations being at about the same rate as elsewhere, but the sickness insurance associations at a cost of about 8 per cent.

In the matter of prevention it is everywhere acknowledged that the system in use in Germany is by far the most effectual, the employers imposing upon themselves rules for avoiding accidents to which they would probably never submit, were they imposed by the government or by a private insurance company.

That this is true, and that it may greatly reduce the hazard is sufficiently shown by the experience of the factory mutuals in the United States in fire insurance, which have so greatly reduced the hazards that the cost of insurance is frequently one-tenth of one per cent per annum or less, whereas it used to be from 2 per cent to as high as 5 per cent or higher.

There is also no objection under such a system to affording permanent benefits; and the state is interested, not in having compromises made, which will save a dollar here or there for the funds, but in having the benefits so paid as to support all dependents. The Washington law so provides, both as to disability benefits and benefits to widows and orphans.

Another very great advantage, especially in introducing such a plan, may also be realized by adopting the assessment system as in Germany, and more recently in Hungary, under which no more is collected currently than is currently required to meet claims.

This would not be safe under a voluntary system, but under a

[3]Including prevention, adjustments and litigation.

compulsory system there is, of course, no more reason that the government should collect more of these taxes than are currently required, than that it should collect more taxes for any other purpose than are currently required.

Under such a system, therefore, the cost at the outset would not be more than the premiums employers are paying at present; and the increase would be so gradual that at least twenty-five years would elapse before anything like a maximum would be reached, which maximum, likewise, would obviously still be very much less than under any system of private insurance.

Under such a system, also, of course, no employer could be ruined, and thereby no dependents deprived of their benefits.

The question is raised immediately as to whether such legislation will be constitutional. Sufficient time is not allotted me to undertake a discussion of this question. It has, however, from the beginning seemed to me that laws of this character have a much better chance of being declared constitutional than any other laws, excepting possibly those which are purely optional, and among such I hesitate to include the quasi-optional, which require choice to be made in order to remain under the negligence laws.

This view I had formed prior to 1909, after consulting all the decisions available. It has recently been strongly confirmed by the reasoning of the Court of Appeals of New York in declaring the workmen's compensation act unconstitutional, and by the decision of the Supreme Court of the United States in the Oklahoma bank guaranty cases.

One result, also, of the limited research which I have been able to make in the matter is to indicate that there is even greater probability that a proper *national* act of this form would be declared constitutional than there is that similar acts of the legislatures of the different states would be so declared. The national constitution is in this respect broader as to the taxing power than the constitutions of most of the states.[4]

It is peculiarly desirable, likewise, in view of the absolutely free trade among the states that, if possible, this legislation be national, in order that there may be no discrimination against the industries of one state in favor of those in another. The variation

[4]This view is strongly confirmed by an exhaustive examination of authorities since completed.

in rates for employer's liability insurance is now three to one or even four to one, as between industries otherwise alike but in different states. This should be remedied, not aggravated.

If, therefore, the question, "What system of workmen's compensation is best adapted to the United States?" is to be answered, as if it read, "What system is best for the people of the United States?" there is but one answer possible.

If, on the contrary, it is, "What system of workmen's compensation is most likely to be adopted, taking into account certain prejudices alleged to exist in the United States?" it may be that the answer would be different. Even of that, I am not convinced; for I do not believe that American employers, employees or our citizens in general, are in favor of doing this thing in a way which is certain to be the least effectual and at the same time the most expensive.